IN THE

Supreme Court of the United States

October Term, 1968
No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,
v.
EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JOINT PETITION FOR REHEARING OF APPELLEES, IDAHO PUBLIC UTILITIES COMMISSION, PUBLIC UTILITY COMMISSIONER OF OREGON, AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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SUBJECT INDEX

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PETITION FOR REHEARING

Petitioners Idaho Public Utilities Commission, Public Utility Commissioner of Oregon and Washington Utilities and Transportation Commission, under the provisions of Rule 58 of this Court, pray that this Court grant rehearing of its order of June 16, 1969, vacating the judgment of the District Court and remanding the cause for proceedings in conformity with its opinion.

Petitioners are the regulatory agencies of Idaho, Oregon and Washington and as such are charged with the duty of representing the public interest in all proceedings affecting rates, charges and services to consumers of regulated public utilities doing business in those states.

REASONS FOR GRANTING REHEARING

I. Participation of Idaho, Oregon, and Washington Commissions in Proceedings

In view of the procedure followed by this Court in arriving at its decision of June 16, 1969, petitioners herein have not been afforded the opportunity to present to this Court through brief and oral argument their positions relative to the final decree of the District Court. Petitioners did file with this Court a Joint Motion To Affirm *Or In The Alternative* To Dismiss and a supporting brief in answer to the Jurisdictional Statement filed on behalf of the Utah Public Service Commission. Petitioners were also represented at the oral argument regarding the motion of appellant to dismiss its appeal under Rule 60. At no time, however, have petitioners been granted the opportunity to present to this Court their views relative to either the merits of this case or whether this Court's mandate has been followed in a satisfactory way.

II. Interest of Idaho, Oregon, and Washington Commissions in Proceedings

Petitioners as regulatory commissions within their respective states are motivated by a concern for public not private interests. It is in the protection of the public interest that petitioners respectfully bring to the attention of this Court the injurious consequences to the consum-

ers of natural gas if its mandate of June 16, 1969, is allowed to stand.

The company to be created in this proceeding will be a public utility and will be the only gas pipeline supplier certificated by the Federal Power Commission to serve the Pacific Northwest. The gas consumer must look to this pipeline supplier as the ultimate source of natural gas. If gas costs increase, or the supplier is unable to meet its financial commitments, the gas consumer in the Pacific Northwest cannot turn to another supplier for there is no other. The public interest is not being served if out of this divestiture increased gas costs are incurred by the consumers of the Pacific Northwest. It is an unavoidable economic consequence that as the cost of gas increases, the increase is inevitably reflected in the price the consumer must pay, either by foregoing rate reductions or in rate increases.

III. Result of Requirement That Divested Assets Be Sold for Cash

The requirement of a cash sale of the assets inflicts upon consumers the harshest of consequences. This Court's order of June 16, 1969, directing that only a cash sale of the assets will satisfy the rudiments of complete divestiture, actually has the effect of perpetuating the harm to consumers that this lawsuit was intended to correct. It forces upon the consumer the expense of supporting an inflated capitalization and harnesses New Company with a financial structure that will impede its ability to expand its present markets. The New Company would be placed in the position of being at a grievous competitive disadvantage insofar as the California market

is concerned. The effect of this Court's mandate, requiring a cash sale of the assets, is to saddle New Company with a capitalization garnered from a financial market which is presently demanding the highest interest rates that this country has experienced in over a century.

The record in this case reveals that on December 31, 1967, New Company would have a proposed capitalization of $231,553,000. Of this amount, the total long-term debt, including maturities, was $170,542,000, and common equity was $61,011,000 (El Paso Ex. 1, Tab 17). It is recognized that since this date, new capital improvements have been added to the system and a certain amount of debt has been retired but these figures will suffice for illustrative purposes. The capitalization of approximately $231,000,000 also reflects the book value of New Company properties which is the original cost less depreciation.

Testimony in this record indicates that the bondholders of El Paso had agreed to become the bondholders of New Company and would "roll over" the debt to New Company for a premium of ⅛th of 1 percent, which would result in New Company having an embedded debt cost of approximately 5.26 percent. As a result of this Court's mandate, that debt with its low embedded cost will disappear and equivalent debt money from today's market will be obtained. In essence, New Company is forced to trade debt at a cost of 5.26 percent for equivalent debt at a current market cost which could well be in excess of 8.5 percent or 9 percent. In view of the fact that interest paid on debt is a component embodied in computing a required rate of return for a regulated utility, it is neither

El Paso nor New Company which will pay the additional cost of debt on $170,000,000, but the ultimate consumer of natural gas will be the individual from whose pocket this additional cost will be paid. A prohibition of the debt roll over would provide a windfall to present bondholders at the expense of present ratepayers, and nothing more.

This Court states that: "(a)ssumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league" (slip opinion, p. 7). Use of the word "assumption" implies that El Paso would be liable should the New Company default on the indebtedness assumed. There was no assumption in that sense. New bonds were to be issued to the same lenders. El Paso would thereafter have had no obligation whatsoever in connection with them.

It should be pointed out that the retirement of El Paso debt and the debt of New Company is a continuous operation which tends to dissipate the common identity of the bondholders of the two corporations. As new issues of debt securities are issued by El Paso and New Company, further dissolution of the common identity would occur.

IV. Effect of Requirement That Assets Be Sold for Cash

New Company's books must reflect the price paid for the properties. Under a cash sale, if $231,000,000 were paid as of December 31, 1967, then the book value of the properties and the cash sale would be the same. However, it is expected that in today's market, book value and market value of these properties would not be identical. This Court's mandate requiring a cash sale will result in

New Company reflecting on its books all consideration paid in excess of book value (known as an "acquisition adjustment" for rate making purposes) and this would create an immediate deterrent to its viability and credit position.

The very nature of the cash sale is what creates the acquisition adjustment problem, culminating in a direct detriment to both present and potential consumers of natural gas of New Company. If the excess is included in the rate base, then the consumer must pay rates derived from this inflated base. If it is not included in the rate base, there will be a substantial dilution of the equity which will impair New Company's ability to attract new capital.

It is the combination of this Court's disallowance of the roll over of the debt and the Court's requirement for a cash sale that so drastically increases New Company's cost of service and visits upon consumers the substantially higher rates.

V. New Company Created by this Court's Mandate Will Be in a Weaker Position Than Was Pacific Northwest Pipeline

Since New Company will be a regulated utility, the Federal Power Commission will make a determination as to its rate of return. To date the rate of return allowed regulated utilities by the Federal Power Commission has been in the neighborhood of 7 percent. However, under this Court's mandate, the entire debt interest cost alone will be substantially above that level. New Company is entitled to recover in dollars an amount sufficient to cover that interest cost, plus a reasonable return on book

equity under present rate making principles. New Company's compliance with these standards will result in a substantial increase in rates to existing customers, all of which is caused by nothing more than a change in ownership. New Company is placed in a position of attempting to compete in the California market against existing pipeline competitors who are operating at a cost substantially below that of New Company, which is to be required to finance its entire operation with cash in the present financial market. The end result is that New Company, under this Court's mandate, will have higher debt and equity costs and will not be placed in the same competitive position as was Pacific Northwest Pipeline Corporation at the time of the illegal acquisition. The method of divestiture adopted by the District Court, that being a plan other than a cash sale, avoided the harmful effects discussed above.

CONCLUSION

The basic premise underlying this Court's decision is that the public interest dictates that this case must be remanded for further proceedings. Had the Court allowed the parties to file full briefs and present oral argument, the state regulatory agencies would have demonstrated that the District Court decision would better serve the public interest than would the decision of this Court. Yet, the state regulatory commissions of Idaho, Oregon, and Washington, with the prime duty to represent the consumer interest, have not been permitted adequately to represent the interests of the consumers of natural gas in the Pacific Northwest. If permitted to do so the regulatory agencies would have or will show that the unavoid-

able result of this Court's decision is higher gas costs to the consumer in the Northwest and a removal of any possibility that the divested company will be a competitor in *any* market.

Petitioners have not been heard on these issues and have not had an opportunity to submit briefs on them. Petitioners were parties below, and they should be afforded the right at least to submit briefs, it not to argue, for anything else fails to accord due process to them and the citizens of the states of Idaho, Oregon, and Washington.

For the reasons set forth above, it is respectfully urged that rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel of Record for Petitioners